IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1782 of 2004

in

SPECIAL CIVIL APPLICATIONNo 10463 of 2004

with

LETTERS PATENT APPEAL NO. 1785 OF 2004

in

SPECIAL CIVIL APPLICATION NO. 10398 OF 2004

with

CIVIL APPLICATIONS NOS.7385 & 7424 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PARMAR PRIYANK CHANDRASINH MINOR THRO.FATHER

Versus

STATE OF GUJARAT

Appearance:

1. LETTERS PATENT APPEAL No. 1782 of 2004

MR D.C. DAVE, Advocate for the Appellant
MR S.N.SHELAT, ADVOCATE GENERAL with MR.S.P. HASURKAR, A.G.P. for the Respondent No.1-2
MR K.B. PUJARA, Advocate for the Respondent No. 3
MR BM MANGUKIYA, Advocate for the Respondent No. 4

2. LETTERS PATENT APPEAL No. 1785 of 2004

MR V.M.TRIVEDI, Advocate for the Appellant
MR S.N.SHELAT, ADVOCATE GENERAL with MR.S.P. HASURKAR, A.G.P. for the Respondent No.1
MR K.B. PUJARA, Advocate for the Respondent No. 2

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 29/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. Both these appeals are directed against the common judgment and order dated 2nd September 2004 passed by the learned Single Judge partly allowing Special Civil Applications Nos. 10463 of 2004 and 10398 of 2004, and issuing certain directions to the Centralized Admission Committee for the M.B.B.S. Course. A direction was given that the student, who was admitted in S.E.B.C. category though entitled to be treated on open merit against an unreserved seat, should not be admitted against the general category and be continued in the reserved category if different fee structures are provided for the students of general and reserved categories, but if by being shifted to non-reserved category, the candidate was not required to pay additional fees, then in that case, the admission of that candidate of reserved category may be treated as in

non-reserved category and thereafter, the seat falling vacant shall be filled up from amongst the left out candidates on the basis of their inter-se merit from the reserved category. If the said candidate is retained in the general category, then the vacancy of the general category shall be filled up by the Centralized Admission Committee from amongst the left out candidates belonging to the general category.

2. In Letters Patent Appeal No.1782 of 2004, the appellant (original petitioner) who was a general category student, had appeared in the Higher Secondary School Examination held in March 2004 and secured 376 out of 450 marks in the relevant subjects for admission to professional courses. The respondent No.2 Centralized Admission Committee and the respondent No.3 College, invited candidates as per the merit order for admission to the M.B.B.S. Course in order of merit of the local students as per their applications. Admission was to be governed by the Rules for Admission to M.B.B.S. and other Courses framed under the Government Resolution dated 15th May 2004. According to the petitioner, he was qualified as a local student in respect of the respondent No.3 College and had remained present on 31st July 2004 pursuant to the advertisement calling the candidates whose marks and merit numbers were mentioned in the advertisement, a copy of which is at Annexure "C" to the petition. This advertisement shows that the reserved category candidates were called on 30th July 2004, while the open merit candidates were called on 31st July 2004. In the note below this advertisement, it was specifically stated in item (2) that all the candidates including those who secured marks lower than the marks of the candidates whose marks and merit numbers were mentioned in the list and were seeking admission against the local seats, were also required to be present on the dates on which the candidates of the respective categories were called. According to the petitioner, on 31st July 2004, one candidate Jasani Kalpesh Narandas, who had secured 376 marks, but was ahead of the petitioner, was granted admission as a last student in the category. However, at a latter stage, it was revealed that the said candidate was not eligible for admission in the category of local students. The petitioner, therefore, sent an application dated 4th August 2004 to the Chairman of the respondent No.2, pointing out the infirmities in the admission of Jasani Kalpesh and requesting that his admission be cancelled. It is the case of the petitioner that, two other candidates ahead of the petitioner at Srl. No.1901 and 1922 of the category of local students and who were eligible for admission if the seats were vacant, were

absent on the specified date and therefore, the petitioner was eligible for admission as a local student when Jasani's admission was cancelled. Thereafter, admission of Jasani was cancelled by the respondent No.2 by communication dated 12th August 2004, a copy of which is at Annexure "F" to the petition. The petitioner, therefore, claimed that he was entitled to be offered the said vacancy in the order of merit, because, he was the only next available candidate on 31st July 2004 and had Jasani not been wrongly given admission on that day, this petitioner would have been admitted against the local seat of the First M.B.B.S. Course. According to the petitioner, by not offering the said seat that fell vacant by virtue of cancellation of admission of Jasani Kalpesh, the respondent No.2 had acted contrary to Rule 14 of the said Rules under which the seat was required to be offered to the next candidate in the waiting list in order of merit. It will be noticed from the petition of this appellant that no contention regarding any possible variation of fee structure was raised in the petition.

3. In Letters Patent Appeal No.1785 of 2004, which arises from the Special Civil Application No.10398 of 2004, the appellant-original petitioner (who is the respondent No.4 in Letters Patent Appeal No.1782 of 2004) has challenged the impugned decision of the learned Single Judge on the ground that the learned Single Judge committed an error in assuming that, in future, the fee structure of the Institutes was likely to be different, and had misinterpreted Rule 2.6. According to this appellant, no directions to the Centralized Admission Committee were required to be given for seeking clarification on the question of fee structure. In his petition (Special Civil Application No. 10398 of 2004), the appellant had sought a direction on the respondents Nos. 1 and 2 to give admission to him in the respondent NO.3 - College against the vacancy existing or in the Medical College, Jamnagar. According to the petitioner, he had secured 322 marks out of 450 in the Higher Secondary School Examination, Science Stream, and being S.E.B.C. candidate, he was entitled to get admission in reserved category. In paragraph 2 of the petition, he stated that the S.E.B.C. candidates securing marks between 432 to 330 were called on 30th July 2004 at 2.30 p.m. Being misled by this information, the petitioner, who had secured 322 marks, did not remain present and the candidate, who secured 310 marks, was admitted. We may note here that, in the advertisement, a copy of which is at Annexure "C" in the cognate petition, there was a note below the notice calling all the candidates seeking admission against local seats, including the candidates

who secured less marks, to remain present on that date. According to this petitioner, he had earlier preferred Special Civil Application No.9476 of 2004 seeking admission to the course on the ground that a candidate lower in merit order was admitted. That petition was disposed of on 6th August 2004 as not pressed. In the order, a copy of which is at Annexure "A" to the petition, the fact that, since the petitioner did not remain present, admission was granted to the next candidate, was noted. A statement by the learned Assistant Government Pleader, under instruction of a Member of the Admission Committee, to the effect that in case any vacancy falls or any student granted admission fails to pay the fees within the stipulated time, the petitioner shall be considered for admission as per inter-se merit, was recorded; and the learned counsel for the petitioner, under instructions, did not press for the petition. The Court, therefore, held that no further orders were required to be made, and directed the Centralized Admission Committee to act as per the statement made on their behalf by the learned Assistant Government Pleaders. According to this petitioner, thereafter he came to know that one seat of Jasani Kalpesh who was at Srl.No.53 of the general category list, had fallen vacant due to non-payment of fees. It is stated that the S.E.B.C. candidate, Patel Amikumari Bhavansing, who had also secured 377 marks, but was given admission in S.E.B.C. category, instead of being included in the open merit general quota as per Rule 2.6, was required to be shifted from the list of S.E.B.C. to the general list and the vacancy so arising in the S.E.B.C. quota by transferring Patel Ami Bhavan from S.E.B.C. general list as per Rule 2.6 was required to be offered to the petitioner. It was also submitted that, in the S.E.B.C. merit list for admission in medical college, the candidates above the petitioner had secured admission in one or the other college and that, one seat of Jigar Jadav, S.E.B.C. candidate, who had secured admission at Jamnagar, had fallen vacant and therefore also, the petitioner was entitled to get admission against that seat. According to the petitioner, his right to admission in a vacancy in the respondent NO.3 Institute was crystallized.

4. In Letters Patent Appeal No.1782 of 2004, the Member Secretary, Centralized Medical Admission Committee has filed an affidavit-in-reply in which it has been stated that, pursuant to the approval dated 28th July 2004 received from the Central Government, the Centralized Admission Committee issued an advertisement on 29th July 2004 in all local newspapers for filling up

newly sanctioned seats for B.J.Medical College and other four Self-Finance Medical Colleges, including the Surat Municipal Corporation Medical College. The counselling for the admission was scheduled on 30th July 2004 and 31st July 2004. The said admission counselling for reserved category candidates as well as the physically handicapped candidates was scheduled on 30th July 2004, while on 31st July 2004, the admission counselling was scheduled for the open category candidates. A copy of the advertisement is annexed to the said reply at Annexure "I". In paragraph 2 of the said reply, it has been stated that, on the scheduled day for admission for reserved category i.e. on 30th July 2004, Patel Ami Bhavanbhai was not sure whether she would be able to secure admission in open category, which was scheduled for the next day and therefore, she secured her admission on S.E.B.C. reserved seat. She had secured 377 marks and above her, there were 129 students of "Surat local". It is stated that even the Admission Committee was not sure, whether she would be able to get admission in open category on the next day. On the next day, admission for Surat local open category reached to 376 marks and Jasani Kalpesh N. (merit list No. 001891) was the last person admitted. However, he expressed his inability to pay balance fees and got his admission cancelled. It is further stated in paragraph 4 of the affidavit that Patel Ami had expressed her inclination to remain in S.E.B.C. category. Her affidavit seems to have been obtained and a copy thereof is at Annexure "B" to the reply. The said affidavit was sworn on 4th September 2004 i.e. after the order of the learned Single Judge was made on 2-9-2004. In paragraph 5 of the affidavit-in-reply, it is stated that Patel Ami Bhavan was not getting admission in open category against the seat at Surat local.

4.1 A further affidavit-in-reply has been filed by the Member-Secretary (Medical), Centralized Medical Admission Committee in Civil Application NO.7385 of 2004 (in Letters Patent Appeal No.1782 of 2004) in which it is stated that the Centralized Admission Committee has adopted the present admission system for more than 25 years and it is in accordance with the various decisions of the Apex Court and the High Court. Narrating the admission process in paragraph 2 of the said affidavit-in-reply, it is stated that, upon receipt of admission application form from students, general merit list is prepared after scrutinisation of the forms. From that general merit list, other three category-wise merit lists are prepared of Scheduled Tribes, Scheduled Castes and Socially & Educationally Backward Class of candidates. All the four lists are displayed on the

notice board and since the last year, they are also published on internet on the website of the Health Department of the Government. By publishing advertisements in leading Gujarati and English newspapers, detailed schedule of admission counselling is made known to all, and individual call letters are also dispatched to each of the candidates informing them date, time and venue of admission counselling. On the day of admission counselling, approximately 600 students seeking admission in Engineering & Medical Courses are called in three sessions as per merit order and in each session, approximately 200 students are invited in a common hall and informed about the availability of the streams, seats in colleges and fees structure by way of counselling and the students are given choice forms. The candidates are also informed that "whatever is available today at the time of his turn, if he does not opt, it is deemed to have been forfeited for all time to come". (emphasis added). It is also informed that he will be given chance in future if seats are available, which are not now available to him. Thereafter, they are arranged in merit order and thereafter, they are called one by one as per their merit order in the Admission Committee Hall. The candidate is allowed to be accompanied by a companion of his choice. The information about availability of seats in different colleges is continuously displayed on the electronic media and frequent announcements are also made on loudspeaker. In the Admission Committee Hall, the members of two Committees, namely, Centralized Medical Admission Committee and Joint Admission Committee for Professional Courses sit together. The Centralized Medical Admission Committee deals with admissions in Medical / Dental / Physiotherapy / Ayurved / Homeopathy, while the Joint Admission Committee for Professional Courses deals with admissions of different branches of Technical Education and Pharmacy. On reaching his turn, the candidate is asked about his choice in writing about streams and informed about availability of seats in all the above referred streams. The admission of the candidate is finalized only in one stream and for rest of the streams, his withdrawal is taken. At this stage, if the student is of reserved category, he is also informed about the availability of his highest choice about stream, place and college on reserved category and it is open for him to exercise his option of reserved category if he is not getting his highest choice in the general category. It is then stated in the paragraph 3 of the affidavit-in-reply that, by following the above system, the Admission Committee is able to satisfy "merit as well as choice and practical implementation of all Rules, namely, 2, 2.4, 2.6, 7 and 7.1". It is stated that the

above system has received acceptance and proved the test of time.

4.2 In the affidavit-in-rejoinder of the respondent NO.4 of Letters Patent Appeal No.1782 of 2004, it is stated that the Centralized Medical Admission Committee acted in contravention of Rule 2.6. It is stated that, for achieving the objective of the mandate of Rule 2.6, the admission to general category was required to be undertaken first so that all meritorious students of any reserved category can come in on the strength of merit. It is also stated that the consent or objection of Ami Bhavan Patel was of no consequence. It is stated that the mistake committed by the Centralized Medical Admission Committee was required to be rectified only to the effect that the Central Commission should not be asked about the future view or different fee structures and that the said respondent should be given admission straightaway.

4.3 In the affidavit filed by the respondent No.5, it is stated that the petitioner had not mentioned the correct fact that there were in all four students including Kalpesh Jasani and the petitioner, who had secured 376 marks in the qualifying examination of Std.12th. All these four students were given their number in the list of merit. Kalpesh Jasani was at Srl.No.1891. Another student Golakia Bhavesh was at Srl.No.1901 and the name of Punit i.e. the respondent No.5 appeared at Srl.No.1922, while the name of Parmar Priyank (petitioner of Special Civil Application No.10463 of 2004) appeared at Srl.No.1930. Therefore, the statement made in the petition that the petitioner was required to be considered immediately after Kalpesh Jasani was not correct. It is also stated that the petitioner has made an incorrect statement that the two students who were ahead of the petitioner at Srl.No. 1901 and 1922 were absent. It is stated in paragraph 6 of the affidavit that the admissions were closed after the last admission of Kalpesh Jasani, who was at Srl.No.1891 of the merit list and therefore, the question of marking presence or absence of the candidates after that number did not arise since there was no admission to be offered after that last admission. It is stated that this respondent No.5 was not called by the Committee as his turn did not reach and therefore, the question of failure to report did not arise.

5. The learned counsel appearing for the appellant of Letters Patent Appeal No.1782 of 2004, who is a candidate belonging to non-reserved category, contended

that since the admission of the candidate Kalpesh Jasani was cancelled, the petitioner being the next in merit order was entitled to be admitted against that seat. It was argued that, as per Rule 14 of the Admission Rules, right of any candidate to get admissions is forfeited if he is absent before the Admission Committee and such seat is required to be offered to the immediate next candidate. Therefore, the petitioner was entitled to be offered the seat which was available on the cancellation of admission of Kalpesh Jasani. It was further contended that there was possibility of different fee structures for different categories of students and that Rule 2.6 cannot be interpreted to the detriment of candidates belonging to the reserved categories. Therefore, there was no need for treating Patel Ami, who was already absorbed in the S.E.B.C. category against the unreserved seat, even though on the basis of her 377 marks, she may have been entitled to be counted against the unreserved seat in the open merit. It was contended that a S.C./S.T./S.E.B.C. candidate was entitled to opt for his reserved category even if he appeared in the open merit against the unreserved seats so that he can get a college of his choice which would otherwise go to a person less meritorious than such candidate in the merit list of the relevant reserved category. It was also submitted that the interpretation placed by the learned Single Judge on Rule 2.6 will have the effect of exceeding the reservation quota beyond the permissible limit of 49% of the total available seats. He also contended that the petitioner of Special Civil Application NO.13098 of 2004 did not have any locus to institute the petition and stake her claim, because, admittedly she had remained absent on the specified date when called in the order of merits. It was argued that once any student is found to be absent on the dates specified for the purpose of counselling, such student would lose his right for all time to come and it was impermissible to offer one more chance to such student even at the time of re-counselling due to reshuffling of admissions.

5.1 The learned counsel placed reliance on the decision of the Supreme Court in Rajiv Mittal v. Maharshi Dayanand University, reported in AIR 1998 SC 680, to point out that, it was held in paragraph 14 of the judgement, in the context of Admissions to M.B.B.S. Course, that in case if any reserved category student had managed to secure admission to a general category seat in the first counselling for that category, then he will not be entitled to adjustment against reserved seat. The reserved category candidate had failed to secure admission to a seat in open category in the first

counselling for that category but had secured admission to the reserved seat, in that case. Therefore, the question of his being shifted or being regarded as candidate to open merit seat which had become available only after he had secured admission did not and could not arise. As per the Note 2 in the information brochure, it was provided that: "A candidate who applies either for reserved category or for both reserved and open will be considered first in open category. In case he/she is not selected in open category, he / she will be considered for reserved category". This Note was construed by the High Court to mean that the candidate who was also in the merit list for the seat in the open category should be considered as having been selected to the open category seat and he should not be considered as having been selected for the reserved category seat. The Supreme Court held that the Note was not correctly construed by the High Court, and that, it will have application only when a reserved category candidate is in a position to secure, and secures admission to a seat in the general in the same counselling in which seat is available to him in the reserved category. It was held that the concerned reserved category candidate did not secure admission to anyone of the 49 unreserved seats as his serial number was at Serial Number 62 and the last candidate who had secured admission at the first counselling against the 49th seat was at Serial No.53. The candidate was, therefore, rightly allowed to take part on the second day of the first counselling for the backward class candidates and selected and granted admission. It is in this context that it was held that once the said candidate had secured admission in the reserved category quota at the first counselling for the backward class, there would be no occasion for him to take part in the second counselling for the general category seat for the same college which was subsequently held. The seat which had fallen vacant was one of the 49 seats which was required to be filled by the general category candidates and thus, the said Note No.2 was not applicable to the case before the Supreme Court.

6. The learned counsel appearing for the respondent No.5 (Letters Patent Appeal No.1782 of 2004) argued that the respondent No.5 was placed higher in the merit list than this appellant and was entitled to be offered the vacant unreserved seat of Jasani Kalpesh. He contended that the appellant had made wrong statements in the petition that he was next in the merit order and that this respondent was absent on the specified date. It was submitted that a candidate whose turn did not come for appearing before the Admission Committee on the specified

date cannot be said to have failed to appear before it under Rule 14. He submitted that once Patel Ami Bhavan was already admitted in the reserved category, she cannot be shifted back to the general category.

7. The learned counsel appearing for the appellant of Letters Patent Appeal No.1785 of 2004 argued that Patel Ami Bhavan was entitled to get admission against the unreserved seat and therefore, on a proper application of Rule 2.6, she could not have been absorbed against the seat reserved for S.E.B.C. category. It was submitted that even the candidate, Patel Khushboo, who was far below Patel Ami Bhavan, had secured admission against the unreserved seat on the basis of her 377 marks and therefore, there was no reason to shift Patel Ami Bhavan to the open merit category. It was submitted that even though the appellant was not present on 30th July 2004, she was required to be offered the S.E.B.C. seat that would fall vacant by virtue of Patel Ami Bhavan being treated as having been admitted against the unreserved seat on the basis of Rule 2.6. The learned counsel argued that, when the appellant had withdrawn his earlier petition being Special Civil Application No.9476 of 2004 on the basis of the statement made by the Assistant Government Pleader on 6-8-2004 to the effect that, in case any vacancy falls or any student who is granted admission fails to pay the fees within the stipulated time, the petitioner shall be considered for admission as per inter-se merit, the petitioner was entitled to be considered for admission against the seat falling vacant in S.E.B.C. category. It was contended that Rule 2.6 was mandatory in nature and its operation did not depend on any extraneous fact, such as, choice of an individual candidate. Moreover, Rule 2.6 did not distinguish between Government Medical Colleges and Self-Finance Medical Colleges. It was also contended that the learned Single Judge erred in assuming that, in future, the fee structure of the Institute was likely to change, or that, there would be injustice if a reserved category candidate is shifted to general category. It was submitted that since Justice R.J.Shah Committee had outright rejected the proposal for three level fee structure and had provided only a uniform fee structure, there was no basis for any assumption that the fee structure might change. It was also submitted that the fee structure declared by Justice R.J.Shah Committee was final for three years and there was no scope for treating the candidate Ami Bhavan Patel as a reserved category candidate on an apprehension of any change in the fee structure. It was argued that if Patel Ami Bhavan is shifted to the general category, the petitioner would be

entitled to admission.

8. The learned counsel appearing for the respondent No.2 - Institute submitted that, at present, there was no separate fee structure evolved.

9. The learned Advocate General appearing for the respondents authorities, including the Central Medical Admission Committee, contended that forfeiture of claim contemplated under Rule 14 of the Admission Rules was treated as forfeiture for that particular day on which the candidate was called but did not appear, and it was not treated as forfeiture for all time to come by the Admission Committee. It was argued that forfeiture can be a penalty and it can be a loss of right for dereliction of duty. In support of his submission, he relied on the decision of the Supreme Court in R.S.Joshi v. Ajit Mills Ltd., reported in AIR 1977 SC 2279, which was rendered in the context of the Sales Tax Act, to point out from paragraphs 18 and 19, that, considering the meaning of the word "forfeiture" it was held that this word must bear the same meaning of penalty for breach of a prohibitory direction. The Court held that the fact that there was arithmetical identity, assuming it to be so, between the figures of the illegal collections made by the dealers and the amounts forfeited to the State, cannot create a conceptual confusion that what is provided is not punishment, but a transference of funds. The Court held that the legislature by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers.

9.1 The learned Advocate General further contended that though there was no college-wise reservation, the placement of the candidates was required to be done as per the merit-cum-preference criteria first from the open merit list. It was submitted that if Patel Ami Bhavan was required to be treated against the unreserved seat on operation of Rule 2.6, the consequential vacant seat in the S.E.B.C. reserved category would go only to an S.E.B.C. candidate in the waiting list as per Rule 14.

9.2 The learned Advocate General, referred also to the following decisions :

[a] The decision of the Andhra Pradesh High Court in Y.Raghavendra v. NRT University of Health Sciences, reported in AIR 1999 A.P. 261, was

cited to point out that it was held by the High Court, following the decision of the Supreme Court in Ritesh R. Sah v. Dr.Y.L.Yamul, reported in AIR 1996 SC 1378, that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category, cannot be considered for admission against seats of reserved category.

[b] The decision of this Court in Gujarat University v. Dr. Sida Nitinkumar Laxmanbhai, reported in 1991(1) G.L.H. 581, was cited to point out that it was held therein that the benefits conferred by Articles 14, 15, 16 and 29 on the Scheduled Castes, Scheduled Tribes and S.E.B.C. are in addition to the already existing fundamental rights and other rights. It was held that if such scheme of reservation by special provision has to depend upon the option that has to be exercised by the persons on whom such concession is conferred, then such policy and procedure would be contrary to the constitutional provisions and the law, to the extent that it curtails the fundamental rights or any other right which the reserved candidates are allowed to enjoy. By such concessions, seats are reserved for such candidates and not candidates for seats (See paragraph 9). In paragraph 15 of the judgement, the decision of the Supreme Court in V.V.Giri v. D.S.Dora, reported in AIR 1959 SC 1318 was referred and reliance was placed on the observations made therein that the claim of eligibility for the reserved seat does exclude the claim for the general seat; it is an additional claim and both the claims have to be decided on the basis that there is one election from the double-member constituency. The appeal against the said decision of the learned Single Judge was dismissed by a Division Bench in Dr.Sida Nitinkumar Laxmanbhai v. Gujarat University, reported in 1990(2) G.L.R. 808, in which it was held that conferment of the benefits by way of reservation in services or educational institutions to the members of Scheduled Castes, Scheduled Tribes and S.E.B.C. did not mean that something that was already given, should be taken away and these persons cannot be compelled to opt or elect whether they will compete for reserved seats or unreserved seats.

10. The admissions to Medical Colleges are governed

by the Medical and Indian System of Medicine and Homeopathy Admission Rules, 2004 - 2005, which are based on various policies and directions of the Government of India, the State Government and all the concerned Apex National Councils, as stated in the preamble to the Rules. The validity of any of these Rules was not questioned in these petitions.

10.1 Rule 2 of the said Rules provides for reservation of seats for the candidates belonging to S.C./S.T./ S.E.B.C. at 7, 15 and 27 percent, respectively, of the total seats. One-fifth of these were to be earmarked for the girl students of those categories. Rule 2.4 contains an important provision requiring preparation of separate categorized merit lists for regulating admissions of these respective categories. Rule 2.4 reads as under :

> "2.4 The seats earmarked for admission of the particular category students under reserved seats for the candidates from the category belonging to SC/ST/SEBC (excluding Creamy Layers) etc. will be allotted for admissions of the students of the respective categories. For this purpose, merit list will be prepared category-wise and admissions for each category will be regulated accordingly."

10.2 Under Rule 2.5, the vacant reserved seats are to be treated as unreserved seats to be filled up from the open merit list if candidates are not available for the reserved seats for that particular category. Therefore, so long as the reserved category candidates are available no reserved seat can be treated as unreserved.

10.3 Under Rule 2.6, the candidates belonging to SC/ST/SEBC, who come on open merit, are required to be counted against non-reserved seats and the reservation percentage will be applied in addition to those who come on merit. Rule 2.6 reads as under :

> "2.6 While admitting in the Medical / Dental / Physiotherapy / Ayurved / Homeopathy Colleges of the State Government / Municipal and State quota of Municipal, Grant In Aid and Self-Financed Institutes for these courses, the candidates belonging to the SC/ST/SEBC for whom reservation is made and who come on open merit will be counted against non-reserved seats. The reservation percentage will be applied in addition to those who came on merit."

10.4 The candidate seeking admission under Rule 2 against the reserved category is not allowed to change such category thereafter, as provided in Rule 2.7.

10.5 Under Rule 3.5.1, local students quota has to be filled up by the Centralized Medical Admission Committee as per the merit list prepared by it. In the local students quota seats, admission will be given to local candidates with fees that are at par with the fees in the Government Medical College as per Rule 3.5.1(a).

10.6 Rule 4 lays down criteria of eligibility for admission, and, the minimum requirement of marks at the qualifying examination for admission to the First M.B.B.S. and other Courses are indicated thereunder in sub-rules 4.1, 4.2 and 4.3.

10.7 Rule 5 relates to determination of the merit order and indicates the basis for determining the merit order in the sub-rules contained therein.

10.8 Rule 7 relates to placements in Medical / Dental / Physiotherapy / Ayurved / Homeopathy Colleges in the State and provides that the placement is decided on the basis of merit-cum-preference given by the candidates at the time of interview. The order of preference will not be allowed to be changed in any circumstances, as provided in that Rule.

10.9 Part II of the Rules relates to the procedure for admission. Rule 14 contained thereunder, around which the controversy has centered in the context of forfeiture of claims for admission, reads as under :

> "14. The Admission Committee shall publish the merit lists on the notice board according to which admissions of the respective categories will be regulated. The eligible candidates will also be informed individually by the post instructing them to remain present on a specified date and to pay the fees on the same day. Those who fail to report on the specified date either in person or by a duly authorized representative and do not pay the fees on the same day will be deemed to have forfeited the claim for admission. The seats thus becoming available in consequence will be offered to the candidate on the waiting list in order of merit."

11. From the above provisions of the Admission Rules, it is clear that, out of the total number of seats, the prescribed percentage is to be reserved for the candidates belonging to the Scheduled Castes / Scheduled Tribes / Socially & Economically Backward Class categories. The seats are to be earmarked for admission of the particular category of students and allotted for admission of the students of such respective categories as per the merit-wise category lists. Thus, when the merit order of all the candidates is determined as per Rule 5, from that combined general merit order, the number of unreserved seats available (51% of the total seats) will be allotted for admission strictly in order of merit irrespective of the candidates' belonging to general or any reserved category, to the candidates from the top of the general merit list till the last unreserved seat is filled up. Thus, if there are available 100 total seats, 7, 15 and 27 will be earmarked for S.C., S.T. and S.E.B.C. respectively and the remaining 51 seats will be offered in the order of the general merit from the top and even if the S.C./S.T./S.E.B.C. candidates come up in that open merit list within that range, they will be counted against 51 unreserved seats and not against the seats earmarked for their respective categories. The category-wise merit list for S.C./S.T./S.E.B.C. cannot, therefore, contain candidates belonging to such castes / categories who have come up in the open merit list against the non-reserved seats. The candidates in the merit lists of the reserved categories will, therefore, be candidates who all are lower in the general merit order i.e. below the merit order of the last candidate who is included in the open merit list and is required to be counted against the unreserved seats.

11.1 The candidates who are not included in the open merit list of unreserved seats and the three merit lists of S.C./S.T./ S.E.B.C. will remain on the waiting list in the order of their merit as reflected in the general merit order prepared by the Board / Council. As and when the claim of a candidate who is offered the seat as per the merit order in the merit list is "deemed to have forfeited" under Rule 14, such seat is required to be offered to the candidate on the waiting list in order of merit and not to a candidate who may have been already admitted, nor can it be offered to a candidate whose claim is already forfeited, because, when claim is forfeited, right to admission is lost. Thus, when claim to any seat of a reserved category is deemed to be forfeited under Rule 14, it will go to the candidate belonging to that category in order of merit on the

waiting list. Only when the candidate of that particular category is not available in the waiting list, that such reserved seat will be treated as unreserved to be filled up from amongst the candidates from open merit list of the Board / Council under Rule 2.5. When claim to a seat from the open merit list for unreserved seats is "deemed to be forfeited" under Rule 14, even such seat is to be offered to the candidate on the waiting list in order of merit irrespective of the category to which the candidates belong and not to a candidate who is already admitted or whose claim is already forfeited under Rule 14. If the Rules 2 to 14 of the Admission Rules are correctly followed, there would be no scope for any candidate of a reserved category, who, by virtue of higher merit order, is entitled to be counted towards the unreserved seats meant for the open merit, being included in reserved category.

11.2 The question whether there will be deemed forfeiture under Rule 14 cannot arise before the open merit list for the unreserved seats and the three category-wise merit lists of S.C., S.T. and S.E.B.C. are first prepared. Having prepared such merit lists which are to be published on the notice board under Rule 14 and as per which the admissions of the respective categories are required to be regulated, the candidates in such lists are to be called as per Rule 14 of the Admission Rules. The Admission Committee, therefore, cannot put any candidate of a reserved category, who would find place in the open merit list on the basis of his higher merit order, in the reserved category, either of its own or at the option of such candidate who is required to be included in the merit list meant for unreserved seats. This is because the reservation percentage has to be applied in addition to those who come on merit as per Rule 2.6. Placing a candidate belonging to a reserved category who comes up on open merit and was, therefore, to be counted against unreserved seats in the reserved category would amount to denying a reserved seat to the candidate who would otherwise become entitled to be included in the merit list of such reserved category. Rule 14 will operate only after all the merit lists are prepared for the total number of available seats in respect of the unreserved and reserved categories and they are placed on the notice board to avoid any possibility of mischief or abuse and to bring about transparency in admissions as envisaged under the Rules. The merit cum preference rule would clearly require the open merit list candidates against unreserved seats to be considered in order of merit before considering the reserved category lists, who would

be lower than them in the merit order.

11.3 The requirement of Rule 14 that the eligible candidate will be instructed to remain present on a specified date and pay fees on the same day shows that, on fulfillment of that condition, the seat of the concerned candidate in the merit list is secured. When the open merit list meant for unreserved seats is announced on the notice board, all those who belong to S.C./ S.T./S.E.B.C. and have come up on the basis of their merit order in the open merit list will be able to know whether their seats are secured in that list and there will be no possibility of such candidate getting an unreserved seat on merit being asked an option to get into reserved category, since that process would violate the mandate of Rule 2.6. The Admission Committee cannot ask a candidate of reserved category who is required to be included in the list meant for unreserved seats on open merit whether he would opt for the reserved category merit list, because, even the category-wise merit lists have to be prepared and placed on the notice board before the candidates are called to appear before the Admission Committee. If the S.C./S.T./ S.E.B.C. who are to be included in the merit list of unreserved category as per Rule 2.6 when they come up in open merit are to be put in the merit lists of the reserved categories, the very purpose underlying Rule 2.6, of applying reservation percentage in addition to those S.C./S.T./S.E.B.C. candidates, who come on merit and are to be counted against non-reserved seats, will get frustrated, because, by such process, other candidates entitled to be included in the reserved category merit lists will be denied their just claim as the consequential vacancies in the unreserved seats will pass on as per the general merit order to the candidates on the waiting list. Preparation of merit lists of all the categories of candidates, therefore, necessarily precedes the stage of calling them under Rule 14.

12. It was tried to be argued that since the placement to medical colleges in the State shall be decided on the basis of merit cum preference at the time of interview under Rule 7, the S.C./S.T./S.E.B.C. candidates, who have come up in the open merit list and are to be counted against unreserved seats under Rule 2.6 ought to be given an option to be placed in the relevant reserved category merit list if that is more advantageous to such candidates in the matter of their preference. In our view, such a course will destroy the concept of operating reservation percentage in addition to the candidates who have come on open merit and are required

to be counted against the unreserved seats, far from bringing harmony between the provisions of the Rules as argued. It would create a device of providing an entry to the general category candidates from the waiting list at the cost of the affected reserved category candidate, who will be denied their rightful place in the reserved category list as per Rule 2.6 under which the reservation percentage is to be applied in addition to those who come on merit. If there has been violation of the specific reservation policy underlying Rule 2.6 over a period of time, such illegal course cannot be recognized by the Court in the face of Rule 2.6 and if followed, must be abandoned by the concerned authorities who are bound by the reservation policy, as reflected in the said Rules.

13. No variation in the application of rule 2.6 can be countenanced on the basis of any preference of any open merit S.C./S.T./S.E.B.C. candidate to go into a reserved category in contravention of the provisions of Rule 2.6, nor on the basis of any possible fee variation. In fact, fee structure has nothing to do with the operation of the Rules providing the reservation policy. The S.C./S.T./S.E.B.C. candidates who find their way in open merit list and are to be counted against unreserved seats do not cease to be candidates belonging to such categories and will, therefore, be entitled to the benefits meant for the candidates of the S.C./S.T./ S.E.B.C. in any fee structure that may be decided for them under a policy decision. Even the merit-cum-preference criterion under Rule 7 will not be denied to the S.C./S.T./S.E.B.C.candidates who have come up in open merit, because, they do not thereby cease to be S.C./S.T./ S.E.B.C. candidates and can exercise their placement preference meant for such candidates. In other words, they do not forfeit any benefit meant for all the S.C./S.T./ S.E.B.C. candidates merely by being counted against unreserved seats on the basis of higher merit. Moreover, being higher in the merit order than those who are in the merit lists of reserved categories they would get a wider scope of preference than other candidates of S.C./S.T./S.E.B.C. who are in the merit lists of the reserved categories. The merit-cum-preference criterion for placement applies strictly as per the merit order of the candidates, and, those who are higher in their merit order will get preferences available at the time of their turn. If the candidate in the open merit list is S.C./S.T./S.E.B.C. candidate, he will not forfeit his right of exercising preference for placement from amongst choices available at the time when his turn comes in the merit order. The preferences are required to be offered as per the merit order determined under Rule 5 and that

has nothing to do with the reservation policy reflected in Rule 2.4 read with Rule 2.6. The provisions of Rule 2.4 and Rule 2.6 are unambiguous and require the S.C./S.T./S.E.B.C. candidates coming up on open merit to be counted against unreserved seats for admission purpose and the reservation percentage is to be in addition to those who come up on merit. Such a clear policy statement cannot be obscured by reference to the merit cum preference criterion contained in Rule 7 in the context of placement to colleges. Rule 7 cannot be operated in a way that would violate Rule 2.6. We hold that S.C./S.T./S.E.B.C. candidates coming on open merit are necessarily to be counted against unreserved seats for admission and cannot be shifted by the Admission Committee even on their choice to the reserved category which must contain the respective category candidates on their merit order, but other than those who come on merit in the open merit list. Such candidates in the open merit list will be entitled to be given preference also for seats meant for S.C./S.T./S.E.B.C. while being retained in the open merit list in accordance with Rule 2.6 read with Rule 7, as per their merit order in the open merit list.

13.1 Our view has drawn strength from the decision of the Supreme Court in Ritesh R. Sah v. Dr.Y.L.Yamul, reported in AIR 1996 SC 1378. The Supreme Court was concerned with a question whether a candidate belonging to the Scheduled Caste or any other reserved category, even if is entitled to be selected for selection for admission in the open competition on the basis of his own merit, yet can he be counted against the quota meant for reserved category or will he be treated as an open competition candidate? In paragraph 17 of the judgement, the Supreme Court held that the conclusion was irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But, at the same time, the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. This objective can be achieved by finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter, the case of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever

colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category, but while computing the percentage of reservation, he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate.

14. When an eligible candidate is instructed to remain present on a specified date under Rule 14, the candidate will be considered to have failed to report on the specified date only if such candidate fails to appear before the Admission Committee on such date when called. In order to provide preference as per the merit order and to know whose claims are forfeited so that the forfeited seats can go to the candidates in the waiting list as per the merit order, it would be essential to call the candidates in the order of their merit in the merit lists which are to be put on the notice board under Rule 14. Therefore, the candidates high in the general open merit list who are to be offered the unreserved seats have to be called first from that list. In the present case, there was an error in not calling the open merit candidates first for admission counselling. This is why the candidate of S.E.B.C. - Patel Ami Bhavan, who secured 377 marks and would have secured admission against unreserved seat, opted for S.E.B.C. category, which option could not have been given if the open merit candidates were called first for applying merit cum placement rule. The learned Advocate General appearing for the respondents authorities fairly submitted that this was a mistake on the part of the Admission Committee and Patel Ami Bhavan should have been treated as having been admitted against the unreserved seat if she came up on open merit against the unreserved seats and her seat falling vacant thereby in the S.E.B.C. category will have to go to an eligible S.E.B.C. candidate, as per the merit order in the waiting list, under Rule 14.

15. Forfeiture of claim contemplated in Rule 14 cannot be confined to the date on which the candidate failed to report as per the instructions, before the Admission Committee. Under Rule 14, forfeiture is of the claim for admission, which means admission cannot be offered to such a candidate whose right to claim admission is lost. Forfeiture of claim to admission involves loss of a privilege to be admitted to the M.B.B.S. Course, which results from failure to comply with the instruction to appear before the Admission Committee on the specified date. The forfeiture

contemplated under Rule 14 is not merely a forfeiture of preference for placement, but of the admission itself and a candidate whose claim to admission is forfeited cannot, therefore, be offered a seat again. Any seat available on account of forfeiture must necessarily go to a candidate on the waiting list as per the merit order. There would, therefore, be no scope for confining forfeiture of claim only to the specified date on which the candidate failed to appear before the Admission Committee. This course mandated by Rule 14 is binding on the Admission Committee.

16. In the above view of the matter, if Ms.Patel Ami Bhavan was to find her place on open merit list so as to count against the unreserved quota, she could not have been placed in the reserved category of S.E.B.C. It will be for the Admission Committee to consider this aspect and to treat her against the unreserved seats or in reserved category depending upon the fact whether she had come up in the open merit list, as contemplated under Rule 2.6. Even if she were to be treated by the Admission committee against the unreserved seats, leading to a consequential vacant seat in the reserved category of S.E.B.C., that seat cannot automatically go to the petitioner of Special Civil Application No.10398 of 2004 when that candidate had forfeited claim to admission by remaining absent, as contemplated by Rule 14, on the specified date when persons of that reserved category below the merit order of that petitioner could, therefore secure admission. Once a candidate fails to report on the specified date before the Admission Committee and does not pay the fees on the same day, he is deemed to have forfeited the claim for admission under Rule 14. Therefore, the said petitioner had no right to be considered again for admission. Admittedly, this candidate was not present before the Admission Committee on the specified date and the claim of this candidate, therefore, stood forfeited for admission. The said petitioner cannot secure admission merely on the basis of a statement made by the Assistant Government Pleader on 6-8-2004 in Special Civil Application No.9476 of 2004, to the effect that the petitioner will be considered if any vacancy arose.

17. Under Rule 14, the seats available in consequence of forfeiture of claims are "to be offered to the candidates on the waiting list in order of merit". This provision will be rendered nugatory if the seat becoming available on account of forfeiture of claim of a candidate is to be offered again to such candidate. It has to be offered to the candidate on the waiting list in

order of merit and therefore, with respect, we are unable to subscribe to the view of the learned Single Judge reflected in paragraph 13 of the impugned judgment that such seats available under Rule 14 due to forfeiture of claim can be offered, irrespective of the fact whether the candidates failed to report on the specified date on which they were instructed to remain present.

18. The question of fee structure was not at all germane to the implementation of the reservation policy incorporated in Rules 2 to 2.6 and could not disturb the working of Rule 2.6. If any benefit is to be given to S.C./S.T./S.E.B.C. candidates by any fee structure, that would apply to all such candidates irrespective of their being counted against open merit unreserved seats or being included in the merit lists of reserved categories prepared for the purpose of regulating admission. Therefore, a direction issued on the basis of possible variation in fee structure, which admittedly is uniform as on date, cannot be sustained on such hypothetical basis that has no relevance in the context of the operation of Rule 2.6.

19. For the foregoing reasons, we allow Letters Patent Appeal No.1782 of 2004 and set aside the impugned decision and direct that the Admission Committee will work out the seats available under Rule 14 on account of forfeiture and offer them to the candidates in the waiting list in order of merit by instructing the candidates of the relevant categories to remain present on a specified date in accordance with Rule 14 and in light of the above reasoning. In the above view of the matter, Letters Patent Appeal No.1785 of 2004 is dismissed. All the applications pending in the appeals stand disposed off. There shall be no order as to costs in both the appeals.

[R.K.ABICHANDANI, J.]

[D.H.WAGHELA, J.]

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